No. 93-51

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

TIMOTHY JAY BLACKWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven A. Bernholz
Suite 300, The Center
1506 E. Franklin St.
Chapel Hill, NC 27514
(919) 929-7151

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg Richmond,Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED FOR REVIEW

1. Did the reversal of Defendant's money laundering conviction for insufficiency also require reversal of his conspiracy to distribute cocaine conviction where the evidence and theory offered and relied on at trial in both prosecutions and on appeal were interdependent?

A. In light of McCormick v. United States, 500 U.S. ____, 114 L.Ed.2d 307 (1991), did the Court of Appeals err in affirming the conspiracy conviction on an evidentiary theory not advanced by the Government nor evaluated by the jury?

2. Was evidence that Defendant's "partner," a core member of a conspiracy operating in South Carolina, delivered

cocaine on one occasion to a person in North Carolina who was not a member of the conspiracy sufficient to establish Defendant's membership in the conspiracy alleged in the South Carolina Indictment?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TIMOTHY JAY BLACKWELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Timothy Blackwell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit regarding the conspiracy issue raised therein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published and appears at Appendix ("App.") 1.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its opinion on 4 February, 1993 (App. 1). A petition for rehearing and suggestion for rehearing in banc was denied on 5 April, 1993. This petition is filed within ninety (90) days of that denial. Jurisdiction of this Court is predicated on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the fifth amendment to the United States

Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the District of South Carolina, Rock Hill Division, on charges of money laundering and membership in a conspiracy to distribute cocaine. Subject matter jurisdiction existed in that Court under 18 U.S.C. § 3231.

The Government's theory, from indictment through appeal, was that Petitioner became a member of the "Arrendell-Purser" cocaine conspiracy when he and Odas White purchased a boat from Darrell McKamey in 1989, paying for the boat with cash and a "front" of

cocaine and leaving title to the boat in McKamey's name. White and McKamey were members of the Arrendell-Purser conspiracy, which operated in the Rock Hill, South Carolina and Charlotte, North Carolina area. White obtained cocaine from other members of the conspiracy and distributed the drugs to McKamey, who in turn distributed the drugs in Rock Hill.

The charges of money laundering and conspiracy to distribute cocaine rested solely upon the Government's contention that Petitioner provided money and cocaine in 1989 to White for use in White's purchase of a boat from McKamey. The Government presented evidence of White's trade of cocaine and cash for a boat from McKamey, and that another individual had been present during part of one conversation between White and

McKamey at a marina. McKamey, however, could not identify Petitioner as the individual accompanying White and the Government had only sparse evidence to connect Petitioner to the purchase of the boat.

In an effort to shore up its contention that the Petitioner might have been the source of the cocaine and cash used to purchase the boat in 1989, and thereby joined the conspiracy at that time, the Government introduced testimony from Terry Norman. Norman, who had no alleged connection to the charged conspiracy, testified that he arranged to buy cocaine from Petitioner in 1988 in Winston-Salem, North Carolina.[1]

---

[1] While the Arrendell-Purser conspiracy operated in Charlotte, North Carolina, which is in the Western District of North Carolina, this transaction in Winston-Salem occurred in

According to Norman, Petitioner was unable to deliver the full amount of drugs. Norman alternately testified that Petitioner said that he would deliver the remaining portion, or some unnamed "partner" would make the delivery. According to Norman, a portion of cocaine was later delivered to him by Odas White.

The Government relied on Norman's testimony as "circumstantial" evidence that Petitioner was also the individual who, through White, provided cash and cocaine to McKamey in exchange for the boat in 1989. The Government did not contend at trial or on appeal that the single cocaine transaction in 1988 (in which White, a member of the Arrendell-Purser conspiracy, delivered cocaine to Norman, who had no connection to the

---

the Middle District of North Carolina.

conspiracy, in Winston-Salem where the conspiracy did not operate), constituted a knowing decision by Petitioner to join the Arrendell-Purser conspiracy or proved his membership in it. Indeed, during oral argument before the Fourth Circuit, the Government conceded that if the evidence was insufficient to prove that Petitioner engaged in the 1989 money laundering transaction with White and McKamey, then the conspiracy conviction must also fall.

Throughout the case, Petitioner structured his entire defense in response to this theory and argument, and contended that the Government had failed to prove that he was the individual involved in White's transaction with McKamey, and that he was therefore not guilty of either charge. Nevertheless,

the District Court submitted both charges to the jury, which convicted Petitioner of both charges.

On appeal, the Fourth Circuit agreed that the District Court erred in finding that the evidence was sufficient to link Petitioner to the 1989 boat transaction with McKamey and reversed his money laundering conviction. However, despite the Government's clear concession that the conspiracy count rested on the allegation that Petitioner was the source of White's cash and cocaine in 1989, and the fact that Petitioner, the Government, the trial court and the jury had all proceeded on the theory that the entire case hinged upon the Government's ability to prove beyond a reasonable doubt that Petitioner provided the cocaine and cash to White in 1989, the Fourth Circuit

affirmed the conspiracy conviction on a new and different theory: that Petitioner's use of White in 1988 to deliver cocaine on one occasion to Norman was sufficient to sustain Petitioner's conspiracy conviction.

Petitioner filed a petition for rehearing, pointing out that the court had affirmed Petitioner's conviction on a theory that had never been litigated, and that Petitioner's use of White on one occasion to deliver cocaine to a non-conspirator in North Carolina was not sufficient to sustain a conviction in South Carolina for joining the Arrendell-Purser conspiracy, although it might have served as the basis for a prosecution in the Middle District of North Carolina for a discrete conspiracy involving this one

transaction. The petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. **A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE, IN AFFIRMING PETITIONER'S CONVICTION ON A THEORY UPON WHICH PETITIONER HAD NOT BEEN TRIED, THE COURT OF APPEALS RENDERED AN OPINION IN CONFLICT WITH McCORMICK v. UNITED STATES, 500 U.S. ____, 114 L.Ed.2d 307 (1991), AND "SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION."**

> [I]n a criminal case a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance . . . This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to a jury. Appellate courts are not permitted to affirm convictions on any theory they please because the facts necessary to support the theory were presented to the jury.

McCormick v. United States, 500 U.S. ____, 114 L.Ed.2d 307, 324 n.8 (1991) (emphasis needed).

The premise of McCormick, of course, is not new. This Court has long recognized that defendants have a constitutional right "to have the validity of their convictions appraised on consideration of the case as it was tried and the issues that were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 204 (1946). Indeed, a decision by a court of appeals affirming a conviction under a theory that was never presented to or assessed by a jury would be such a departure from the accepted and usual course of appellate proceedings as to call for the exercise of this Court's supervisory power.

In the face of the clear constitutional right of a criminal defendant to appellate review of his case as it was presented to the jury, the Fourth Circuit here affirmed Petitioner's conviction on a theory that had never been presented during the trial of the case and against which Petitioner had never had the opportunity to defend. From the time of indictment through oral argument on appeal, the Government's consistent theory was that Petitioner joined the Arrendell-Purser conspiracy in 1989 when he and White supplied cash and cocaine to McKamey. The only relevance of Norman's testimony concerning White's earlier delivery of cocaine in 1988 was as a "circumstance" tending to show that Petitioner was the individual involved with White in the boat transaction in

1989. Norman's testimony was consistently viewed as evidence, admissible under Federal Rule of Evidence 404(b), of an uncharged crime admitted to prove Petitioner's identity as a participant in the charged offense. The Court of Appeals, however, after finding that the Government failed to prove Petitioner's involvement in illegal activity with White in 1989, took the Government's "circumstantial" evidence concerning the uncharged transaction with Norman and reshaped it to become the charged offense.

The Court of Appeals, in affirming Petitioner's conviction under a theory that had never been presented to the jury, ignored this Court's admonition that "[a]ppellate courts are not permitted to affirm convictions on any

theory they please because the facts necessary to support the theory were presented to the jury." 114 L.Ed.2d 307, 324 n.8 (1991). This case presents a paradigm example of why a criminal defendant has a constitutional right not to have a conviction affirmed on a basis that was never presented to the jury.

As the case was (erroneously) presented to the jury, it properly could convict Petitioner of the charged conspiracy immediately upon finding that he had engaged in the alleged money laundering scheme. This is what obviously occurred. The jury was not required to make any credibility evaluation of Norman's testimony or, if believed, to conclude it sufficient to connect Petitioner to the Arrendell-Purser conspiracy. Once the jury had

accepted the Government's theory that Petitioner was involved in 1989 with White and McKamey in money laundering in South Carolina, it had no reason to decide if the Government had proven beyond a reasonable doubt that Petitioner was involved with White and Norman in North Carolina in 1988. Due to the District Court's error in submitting the Government's theory to the jury, the jury would not have found it necessary to make the evaluation of Norman's testimony that it would have had to make to convict Petitioner under the theory created by the Court of Appeals. Had the jury been given the opportunity to assess squarely the theory later created by the Court of Appeals, there were ample reasons for the jury to acquit Petitioner. Norman was not a credible witness. He admittedly

consumed large amounts of drugs, committed many crimes, admitted to falsely implicating others in crimes on previous occasions, had never made the allegation concerning the transaction with Petitioner in his debriefings or before the Grand Jury, and had a personal animosity toward Petitioner. In addition, even if the jury chose to accept Norman's testimony, it could well still find that Petitioner's use of White on one occasion to deliver drugs did not meet the Government's burden of proving beyond a reasonable doubt that defendant had willfully joined the Arrendell-Purser conspiracy.

Petitioner was constitutionally entitled to have his conviction reviewed by the Court of Appeals based upon the case as it was presented to the jury.

The Court of Appeals violated this right in creating a new theory upon which it then affirmed Petitioner's conviction, and therefore this Petition for a writ of certiorari should be granted.

II. THE DECISION OF THE COURT OF APPEALS, THAT PROOF THAT DEFENDANT'S "PARTNER," A CORE MEMBER OF A CONSPIRACY OPERATING IN SOUTH CAROLINA, DELIVERED COCAINE ON ONE OCCASION TO A PERSON IN NORTH CAROLINA NOT A MEMBER OF THE CONSPIRACY ALLEGED IN THE INDICTMENT, WAS SUFFICIENT TO ESTABLISH DEFENDANT'S MEMBERSHIP IN THE CONSPIRACY ALLEGED IN THE SOUTH CAROLINA INDICTMENT IS IN CONFLICT WITH OTHER CIRCUITS.

The theory of the Court of Appeals upon which Petitioner's conviction, and sentence of 144 months in prison, was affirmed was that Petitioner's use of White, a member of the Arrendell-Purser conspiracy, to deliver cocaine to Norman, who had no connection to the conspiracy, was sufficient to make Petitioner a part

of the charged conspiracy. The legal issue, then, was whether a rational jury could find beyond a reasonable doubt that Petitioner knowingly joined the Arrendell-Purser conspiracy on the mere evidence that on one occasion a member of that conspiracy, White, delivered cocaine on Petitioner's behalf to a non-conspirator in an area in which the conspiracy did not operate. In holding that this evidence was sufficient, the Fourth Circuit rendered a judgment in conflict with other circuits.

Several circuits, including the Second, Seventh, and Ninth, have held that a defendant does not join an ongoing conspiracy merely by engaging in an illegal transaction with one of the members of the conspiracy. Rather, there must be proof that the defendant was

aware of the existence of the larger conspiracy and chose to further the goals of the conspiracy by engaging in the transaction. See, e.g., United States v. Sophie, 900 F.2d 1064, 1081 (7th Cir. 1990) ("The key question is whether the government presented sufficient evidence to show that the defendants outside the core who engaged in transactions with the core conspirators knew about . . . the core conspirators' objective and embraced the objective"); United States v. Casamento, 887 F.2d 1141, 1156 (2nd Cir. 1989) (in order to link a defendant to a conspiracy, evidence must show that defendant was aware of existence of conspiracy and agreed to join it); United States v. Durades, 607 F.2d 818 (9th Cir. 1979) (fact that drug purchaser knew that seller sold to others not

enough to prove purchaser joined larger conspiracy involving seller and others). In finding that Petitioner's single drug transaction with White, without more, was sufficient to link Petitioner to an ongoing conspiracy including White, the Fourth Circuit greatly expanded the reach of the law of conspiracy, in conflict with decisions from other circuits.

This unwarranted expansion of the law of conspiracy poses serious questions in the administration of justice. Under accepted legal principles, a defendant is held accountable for the acts and words of a co-conspirator. A defendant, in essence, can be convicted primarily upon evidence concerning what other persons did and said, and can be sentenced upon actions of others of which he had no specific knowledge. However reasonable

this may be when a defendant has knowingly joined a large, ongoing conspiracy, this result is simply unjust when a defendant is held accountable for the acts of a conspiracy solely upon the basis of a single transaction with a member of a conspiracy in which the defendant has no other involvement.

This further expansion of conspiratorial liability would only serve to enhance the Government's tactical advantages in conspiracy prosecutions without bearing any relationship to a defendant's moral culpability. The dangers of this type of expansion were aptly expressed by Justice Jackson in Krulewitch v. United States, 336 U.S. 440 (1949):

> [The] history [of federal conspiracy law] exemplifies the "tendency of a principle to expand itself to the limit of

its logic." The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecution for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense, constitutes a serious threat to fairness in our administration of justice.

* * * * *

[E]ven when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.

* * * * *

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a

> practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that the conspiracy existed.
>
> * * * * *
>
> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate.

336 U.S. at 445-46, 449, 453-54.

Petitioner respectfully contends that the Fourth Circuit's holding that a defendant may be held accountable for a larger conspiracy solely on the basis of a single transaction with a member of a conspiracy in which the defendant had no other involvement, is not only in conflict with other circuits, but represents an unwarranted expansion of the law of conspiracy for all of the reasons expressed by Justice Jackson in Krulewitch.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for the issuance of a writ of certiorari.

Respectfully submitted,

Steven A. Bernholz

STEVEN A. BERNHOLZ

Suite 300, The Center
1506 East Franklin Street
Chapel Hill, North Carolina 27514
(919) 929-7151

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served the foregoing Petition for Writ of Certiorari by depositing 3 copies of the same, postage prepaid, in the United States addressed to: Mr. Mark C. Moore, Assistant United States Attorney, 1441 Main Street, Suite 500, Columbia, South Carolina 29202; and the Solicitor General, Department of Justice, 10th St. & Constitution Avenue, N.W., Washington, D.C. 20530.

This the 2nd day of July, 1993.

Steven A. Bernholz

STEVEN A. BERNHOLZ

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 91-5313
DAVID WOODBURY BAKER, *Defendant-Appellant.*	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 91-5361
TIMOTHY BLACKWELL, *Defendant-Appellant.*	)	

Appeals from the United States District Court for the District of South Carolina, at Rock Hill. Charles E. Simmons, Jr. Senior District Judge.
(CR-90-319)

Argued: April 7, 1992
Decided: February 4, 1993

Before ERVIN, Chief Judge, LUTTIG, Circuit Judge, and KIDD, Senior United States District Judge for the Northern District of West Virginia, sitting by Designation.

No. 91-5313 reversed and remanded for further proceedings and No. 91-5361 affirmed in part and reversed in part by published opinion. Chief Judge Ervin wrote the majority opinion, in which Senior Judge Kidd joined. Judge Luttig wrote a concurring and dissenting opinion.

COUNSEL

ARGUED: Steven Alan Bernholz, BERNHOLZ & HERMAN, Chapel Hill, North Carolina, for Appellant Blackwell; Cameron Bruce Littlejohn, Jr., LEWIS, BABCOCK & HAWKINS, Columbia South Carolina, for Appellant Baker. Mark C. Moore, Assistant United States Attorney, Columbia, South Carolina, for Appellee. **ON BRIEF:** G. Nicholas Herman, BERNHOLZ & HERMAN, Chapel Hill, North Carolina, for Appellant Blackwell. E. Bart Daniel, United States Attorney, Columbia, South Carolina, for Appellee.

OPINION

ERVIN, Chief Judge:

Timothy Blackwell was convicted of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(1)-(2). David

Baker was convicted of attempting to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846. In addition, both Blackwell and Baker were convicted of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. § 846 & 18 U.S.C. § 2. Each defendant appeals his two convictions. Blackwell argues that the evidence was legally insufficient to convict him of either the money laundering or the conspiracy charge, and Baker argues that the evidence was insufficient to convict him of the attempt charge. Baker does not challenge his conspiracy conviction by arguing insufficiency of the evidence, but rather he contends that the district court committed reversible error by refusing to give the jury two

instructions. It is his position that the court should have charged the jury on the lesser-included offense of conspiracy to possess cocaine. In addition, because a mere buyer/seller relationship is inadequate to establish Baker's participation in the conspiracy to distribute, he asserts that the court erred by refusing to charge the jury that Baker's distributor must have known that Baker intended to distribute the cocaine, not merely to make personal use of it.

We agree with Blackwell that the evidence of money laundering was insufficient and thus reverse that conviction, but we find that the evidence was sufficient to convict him of the conspiracy charge. We agree with Baker that the evidence is insufficient to support his attempt conviction and that

the district court erred in refusing to give instructions on the lesser included offense in his conspiracy case, thus we reverse both of Baker's convictions and remand his conspiracy case for further proceedings.

I.

Baker's and Blackwell's convictions arose from a three-year investigation of a drug distribution network. The scheme was centered near Rock Hill, South Carolina and Charlotte, North Carolina. The drug ring was led by John Arrendell and Walter Dennis Purser. To date, over 50 individuals have been convicted on a variety of federal drug charges as a result of this investigation.

Baker and Blackwell were indicted along with 15 other individuals in the instant superseding indictment in the

District of South Carolina. All but four of their co-defendants pled guilty prior to trial; one, Odas White, pled guilty during trial; and the final defendant, John Hodges, was convicted along with Baker and Blackwell on November 8, 1990. Hodges did not appeal his conviction. Baker's involvement in the conspiracy predated adoption of the Sentencing Guidelines, and the district court sentenced him to two five-year concurrent terms of imprisonment. The court sentenced Blackwell under the Guidelines to two 144-month terms of imprisonment, to be served concurrently.

II.

Blackwell challenges the district court's decision, made at the close of evidence, that the evidence was sufficient, as a matter of law, to

support a conviction on the charge of money laundering.[1] On appellate review

---

[1] The laundering of monetary instruments statute, 18 U.S.C. § 1956, provides criminal penalties for, in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> . . .
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal Law . . . .

of sufficiency challenges,

> The relevant question is not whether the appellate court is convinced of guilt beyond a reasonable doubt, but rather whether, reviewing the evidence in the light most favorable to the government, *any* rational trier of facts could have found the defendant guilty beyond a reasonable doubt. We must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts to those sought to be established.

United States v. Tresvant, 577 F.2d 1018, 1021 (4th Cir. 1982) (citations omitted). The conviction must be overturned if "the evidence here could only lead to a finding of guilt by an unacceptable process of raw speculation, rather than by a reasoned process of inferring guilt beyond a reasonable doubt." *United States v. Giunta*, 925 F.2d 758, 766 (4th Cir. 1991).

Blackwell was charged with money

laundering on the theory that he concealed his illegal drug proceeds by having a friend use Blackwell's cash to purchase a boat for Blackwell while keeping title to the boat in a third person's name. The government contends that Blackwell gave his friend, Odas White, $30,000 of Blackwell's money to give to Darrell McKamey, a mid-level drug dealer in the conspiracy who worked at a marina. According to the government, McKamey, in turn, sold a boat to Blackwell, but retained title to the boat in McKamey's own name.

To sustain a conviction for money laundering under 18 U.S.C. § 1956(a)(1)(B)(1), the government needed to prove the following essential elements: (1) that Blackwell conducted a financial transaction affecting

interstate commerce (buying the boat) which involved the proceeds of specified unlawful activity (drug sales); (2) that Blackwell did so knowing that the transaction was designed in while or in part to disguise the nature, the source, the ownership, or the control of the proceeds (by having the boat remain in McKamey's name); and (3) that Blackwell knew that the property involved in the transaction was derived from unlawful activity. *See United States v. Brown*, 944 F.2d 1377, 1287 (7th Cir. 1991).

The evidence supporting the money laundering charge comes primarily from four witnesses: McKamey, who cooperated with the police; Terry Norman, a former member of the Hell's Angel motorcycle club and a former drug dealer; Special Agent Ted Warren of the Bureau of

Alcohol, Tobacco and Firearms; and Special Agent Anthony Duarte of the Drug Enforcement Administration.

McKamey testified at trial that he sold a boat to White at the Lake Wylie Marina in South Carolina. According to McKamey, White twice came to the marina to look at boats, the second time with another man. McKamey generally described the man as six feet tall with shoulder length blondish/brownish hair, a description generally resembling Blackwell. McKamey also stated that Blackwell, sitting inn the court room, "looks like him. But I couldn't swear to it." J.A. 216. Further, McKamey testified that "[t]he gentleman left--or walked away . . ." before White proposed to buy a boat for $30,000 cash, keep it in McKamey's name, and "front" McKamey a

kilo of cocaine. J.A. 217-218. According to Jeff Hall, the general manager of the marina, the boat that White bought was white with blue trim.

The government offered into evidence tape recordings and transcripts of two later conversations between McKamey, who was fitted with a body wire, and White. During the first conversation, which occurred on March 23, 1990, McKamey brought up the subject of the boat and stated: "Damn boat--I mean, it's my boat. Everything is mine, you know." J.A. 283. Later, McKamey asked White whether there were any problems with the boat. White responded that he hadn't seen it in a long time and so did not know. McKamey then asked, "Where is he keeping it? He keeps it on the coast, huh?" J.A. 287. Finally, White stated

that "[h]e and his wife split up," assumedly talking about the same unidentified "he." *Id.*

The second taped conversation between White and McKamey occurred on April 10, 1990. The relevant portions of this discussion are as follows:

> DM [McKamey]: [W]hen they started asking me, you know, about the boat and knowing you. And I just told them that, you know, hell, we're just friends.
>
> OW [White]: That fucking boat they asked about it in North Carolina.
>
> DM: Are they?
>
> OW: Yeah.
>
> DM: The IRS?
>
> OW: They subpoenaed Tiny's[2] girl friend.
>
> . . .
>
> OW: You know where the god damn boat, you know where

---

[2] Blackwell's nickname is "Tiny."

the situation come from, don't you?

DM: Nah, not really.

OW: Because, see, they got a . . .

DM: No really, They came in there and asked me about it, and they, uh . . .

OW: Well, they got a Hell's Angel in Winston and he rolled. He'd been a ten-year member, and he rolled. And he told them about the boat and every god damn thing, see.

DM: How'd he know about it? Is he Tiny's friend or something?

OW: Yeah. Tiny a Hell's Angel too.

DM: Oh, I didn't know.

. . .

OW: Well, they got him in protective custody see, but he told about . . . I mean, all he knows is Tiny had a boat and knows he brought it up in Charlotte. . . .

J.A. 355-57.

Norman, the former Hell's Angel,

testified that Blackwell came by Norman's house in Winston-Salem in August 1989 with Blackwell's girlfriend, Patricia Richards, driving a truck pulling a "blue and white boat, probably 23, 25 foot long" that had a cabin under the deck. J.A. 436. Special Agent Warren testified that he saw Blackwell and White together twice, once at a funeral of a Hell's Angel member (a video of the funeral was played to the jury) and the second time at a Hell's Angel motorcycle rally. Special Agent Duarte testified that between January 1989 and September 1990 there were 27 calls placed from White's restaurant to Blackwell's residence, 30 calls from phones registered to Blackwell to White's restaurant, and 134 calls from phones registered to Blackwell to White's beeper.

Blackwell presented the testimony of his wife Kathy, who testified that he had a red boat. The government called Special Agent Warren in rebuttal, who testified about an interview he had with Blackwell's girlfriend, Richards. According to Warren, Richards said that she and Blackwell drove a truck that pulled a blue boat to visit Norman in Winston-Salem.[3]

---

[3] Blackwell challenges the admissibility of Richards' statement to Special Agent Warren, claiming that it is hearsay. The court admitted the statement pursuant to Fed.R.Evid. 804(b)(5), which concerns exceptions to the hearsay rule when the declarant is unavailable. Under this rule, where a declarant is unavailable, the statement in question may be admitted if: (1) it has circumstantial guarantees of trustworthiness, (2) it is offered as evidence of a material fact, (3) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, (4) the general purposes of the rules of evidence and the interests of justice will best be

served by admission of the statements, and (5) the proponent makes known to the adverse party sufficiently in advance of trial or hearing to provide fair opportunity to prepare.

We decline to disturb the district court's considered findings as to these elements. *See* J.A. 812-13. Although the court did not make a specific finding as to the first element, there are circumstantial guarantees of reliability, since Norman's testimony corroborates Richards' statement. The district court found that the second element was met because the testimony was clearly offered as evidence of a material fact, namely, Blackwell's possession of a boat. The district court found that the third element was met for two reasons. First, it found that the "reasonable efforts: that could be expended by the government to procure evidence on the issue were necessarily extremely limited because, in the court's words, "until Mr. Blackwell's wife testified yesterday [that Blackwell owned a red boat, the government] had no real basis for wanting to offer the testimony of a proposed witness in reply." J.A. 812. Second, the court heard the government's statement that it believed that the Hell's Angels hid Richards to prevent her from testifying. According to the government, as soon as it stated in response to Kathy's testimony that it was going to call two witnesses from North Carolina, two "burly gentlemen" left the trial, and the

We do not lightly overturn a jury

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government's subsequent attempts to find Richards in her usual haunts were unavailing. J.A. 787. We agree with the court's finding that the government took reasonable steps, including issuing a subpoena for Richards and searching for her, to obtain her personal testimony, which would have been the only evidence on the point more probative than Warren's testimony. We agree with the court's finding that the fourth element was met that the general purposes of the rules of evidence and the interests of justice would best be served by admission of the statement. Finally, it is true that the government did not give notice of Warren's testimony until the morning before Warren testified, but, as the court found, this delay is explained by its last-minute need for the testimony and its understandable lack of success in locating Richards. We agree with the district court that pretrial notice was wholly impracticable and thus, under the exceptional circumstances of this case, we uphold its grant of notice flexibility. *See United states v. Iaconetti*, 540 F.2d 574, 578 & n.6 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). *Cf. United States v. Heyward*, 729 F.2d 297, 299-300 & n.1 (4th Cir. 1984) (Rule 804(b)(5) is to be used sparingly and only in exceptional circumstances; notice requirements are to be construed strictly), *cert. denied*, 469 U.S. 1104 (1985).

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verdict. In this case, however, we are persuaded that the evidence, viewed with all inferences in the government's favor, does not suffice to uphold Blackwell's conviction for money laundering.

None of the evidence ever firmly identified the boat in question after it was bought, and without precisely identifying one of the elements of the crime, i.e., the property that supposedly was used to launder the drug money, the government cannot sustain the conviction. *See Brown*, 944 F.2d at 1387. Norman's testimony that Blackwell had a blue and white boat and Warren's testimony recital of Richard's statement that Blackwell had a blue boat doesn't necessarily identify the boat in question, which was white with blue trim. There are innumerable boats matching the general, and

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inconsistent, descriptions offered at trial.

Further, none of the evidence showed that Blackwell ever possessed the boat that White purchased. The government never established that the man who accompanied White to the marina was Blackwell. McKamey flatly stated that "I can't hardly say that I identify him." J.A. 217. Even if a reasonable jury could find that this man was Blackwell, the government failed to show that he was in any way involved in the transaction since McKamey testified that the man left before White and McKamey discussed the purchase of the boat. In addition, the agents' testimony that White and Blackwell were seen together at two large gatherings and that the two evidently called each other repeatedly proves no

relationship between Blackwell and the boat, or any boat at all. As the government conceded at oral argument, it is forced to rely upon the two tapes of McKamey's conversations with White to establish the relationship between the boat that White purchased and Blackwell, but we find these tapes too inconclusive to bear the weight that the government places on them. In these tapes, neither McKamey nor White stated who the "he" was who was keeping the boat.

Even if the evidence could be interpreted as showing that Blackwell possessed the boat for a time, it never showed that he was the real owner. The tapes never said that the "he" who was referred to was the true owner of the boat. In fact, McKamey said that the boat was his.

Also, none of the evidence ever identified the money that White paid McKamey for a boat as Blackwell's money. Again, that there was evidently a relationship between White and Blackwell does not show that the money that White used was really Blackwell's. Finally, none of the evidence identified the source of the money; the government never proved that it was proceeds from drug sales.

The government, in response to questions about the adequacy of its evidence at oral argument, repeatedly pointed us back to the McKamey tapes. It is true that Blackwell and his wife had split up, the government had spoken with Blackwell's wife about a boat, that a Hell's Angel (Norman) had "rolled" and had also told the authorities about a

boat, and that Norman and Blackwell knew each other. While these facts are *consistent* with various other possibilities, and to conclude that they would permit a reasonable jury to establish Blackwell's guilt of money laundering beyond a reasonable doubt is to condone conviction through raw speculation. *See United States v. Giunta*, 925 F.2d 758, 766 (4th Cir. 1991). In the absence of specific evidence identifying the boat that White paid for after it was bought, identifying Blackwell as the possessor or owner of this boat, showing that the money White used was really Blackwell's, and showing that this money was the product of drug transactions, these reeds are simply too slender, in our judgment, to sustain Blackwell's conviction for money

laundering.

III.

Blackwell also challenges the sufficiency of the evidence used to convict him of conspiracy to possess with intent to distribute cocaine. The government must first show that a conspiracy to commit the crime existed. A conspiracy is an agreement between two or more individuals to commit a criminal act. *Morrison v. California*, 291 U.S. 82, 92 (1934). This agreement may be inferred from the facts and circumstances of the case. The government must also show the alleged conspirator's knowledge of the conspiracy's purpose and some voluntary and intentional action indicating his participation. These elements, knowledge and participation, may also be proven by circumstantial

evidence. *United States v. Laughman*, 618 F.2d 1067, 1074-75 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980); *see also United States v. Manbeck*, 744 F.2d 360 (4th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

That a conspiracy to distribute cocaine in the Rock Hill and Charlotte areas by the Purser-Arrendell organization existed is undisputed, as is White's and McKamey's participation in this conspiracy. To prove action indicating Blackwell's participation, the government incorporates the evidence discussed above in connection with money laundering and one additional piece of evidence, Norman's testimony that he engaged in a cocaine transaction with Blackwell in Winston-Salem in 1988. Norman testified that Blackwell promised

Norman a kilo of cocaine and gave Norman a half kilo, promising that "[Blackwell's] partner would get the rest to [Norman]." J.A. 435. Some time later, White brought Norman the other half kilo. Norman testified that he paid Blackwell $13,000 in cash and $8,000 worth of methamphetamine for the entire kilo when Blackwell visited Norman with Richards.

Accepting Norman's testimony as true, as we must in reviewing the jury's guilty verdict, Blackwell and White were partners who distributed cocaine together. The law is well settled in this circuit that the uncorroborated testimony of an accomplice may be sufficient to sustain a conviction. *Manbeck*, 744 F.2d at 392. We note, however, that even were corroboration

required, the large number of phone calls logged between phone numbers controlled by White and Blackwell supports the view that the two were partners. We accordingly affirm Blackwell's conviction of conspiracy to possess with the intent to distribute cocaine.

Blackwell points us to a further problem, namely, that the cocaine transaction in Winston-Salem to which Norman testified may be irrelevant to the Rock Hill/Charlotte conspiracy with which Blackwell was charged in the indictment. However, the court correctly charged the jury on the possibility that there were multiple conspiracies. *See* J.A. 889-90. Instead of finding that there were two conspiracies, the jury apparently determined that Blackwell's drug activities were part of the larger,

single conspiracy in Rock Hill and Charlotte. The finding of a single conspiracy by the jury must stand unless the evidence, taken in the light most favorable to the government, would not allow a reasonable jury to so find. *See United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988); *United States v. Urbanik*, 801 F.2d 692, 695 (4th Cir. 1986). The evidence does allow the jury to have drawn the inference that White's participation as Blackwell's "partner" meant that Blackwell was a part of the charged conspiracy, and that his conspiracy conviction should be sustained.

IV.

Baker challenges the sufficiency of the evidence used to convict him of attempting to posses with the intent to

distribute cocaine. The government's evidence against Baker consisted primarily of testimony from three witnesses: Roy Langley, a primary South Carolina cocaine distributor for the Purser-Arrendell organization in 1986 and 1987; Dwayne Langley, Roy's brother; and Ruth Shore, a former hair dresser and low-level drug distributor.

Roy testified that he first became involved in cocaine distribution in approximately 1979 by smuggling seven to eight ounces from Bogota, Columbia to the United States. Roy testified that he sold one ounce of this cocaine to Baker, and that Baker later said that he gave a portion of his ounce to "Kit." In 1986 and 1987, roy sold cocaine for Walter Dennis Purser and Stan Barfield, the principal South Carolina Purser-Arrendell

distributors. Roy testified that one of his main customers was Baker, who purchased ounce quantities. Roy stated that both he and Baker were addicted to cocaine an used it together frequently, in quantities of up to an ounce each per day.

Roy testified that in the spring of 1987, Baker introduced Roy to Ruth Shore, describing her as Baker's customer, and asked Roy to supply Shore with cocaine in Baker's absence. Shore testified that Baker sold her one ounce of cocaine two times, and that he often came to her house to smoke cocaine. Roy testified that around May, 1987, Baker attempted to purchase some cocaine from Roy to take to "Kit" in Charlotte. Further, Roy's testimony states that, shortly before Roy's arrest in June 1987, Roy stopped

selling cocaine to Baker because Baker was getting "squirrely," often coming over or calling at odd hours, presumably to purchase cocaine. J.A. 639. In addition, Roy testified that Baker's brothers and wife tried to keep Baker away from Roy's house, apparently to stop his drug consumption.

Because Baker's cocaine habit had gotten out of control, his wife had him committed to Charter Rivers Hospital in West Columbia, South Carolina on June 18, 1987. Later that day, Baker escaped from the hospital and called roy to pick him up. Roy and his brother Dwayne did so and brought Baker to Rock Hill. Roy testified that Baker said that he needed to hide from his wife and the police, who were trying to put him back in the mental institution, and that he needed to get

money so he could flee the country. Roy rented a motel room for the night in Fort Mill, South Carolina and provided over an ounce of cocaine that the three men consumed that night.

The next days' events (June 18 1987) provide the basis for Baker's indictment and conviction of attempt to possess with the intent to distribute cocaine. Roy testified that Baker called Rock Hill National Bank (the "Bank") to get money because Baker "knew somebody there in Rock Hill National that would give him his money without a bunch of explanations." J.A. 642. Peggy Matthews, a Bank employee who worked at the Eastside branch office, testified that Baker called her that day in an effort to cash a $100 counter check (she instead called her Branch Administrator,

who called the Sheriff). Roy testified that Baker was trying to obtain the money to pay for cocaine; however, according to Roy, Baker did not say how much cocaine he intended to pay for with this money. Roy did not say whether the money was to pay for the cocaine Baker consumed the previous night, nor, if it were for additional cocaine, whether it was for personal use or for distribution. On cross-examination, Roy testified that Baker tried to obtain the money so that he could leave the area because of the problems with his wife. Dwayne testified that Baker wanted the money to give to Roy for cocaine Baker had consumed the previous night.

Apparently because Baker's attempt to cash a check at the Bank's Eastside branch proved unsuccessful, the three men

drove to the Carowinds Boulevard branch in two cars, Roy in his Mercedes and Baker and Dwayne in Roy's Chevette. Roy pulled into a parking lot close to the Bank and was approached by police officers who asked Roy if he knew Baker. The officers saw a gun in Roy's Mercedes, and with Roy's consent the officers searched the trunk, where they found a kilogram of cocaine. Roy was arrested and later convicted of cocaine trafficking. At approximately the same time, Baker and Dwayne, who were circling around the Bank parking lot, saw a police car. In fear of being found by the police, Baker jumped out of the car and ran across a field, where he was picked up by Dwayne. Dwayne testified that Baker said he would pay Dwayne to hide him until he could end his cocaine

addition, because he didn't want to return to the hospital. After six days, Baker apparently contacted his family and returned to the hospital.

In order to convict Baker of attempting to possess the cocaine found in Roy's trunk for the purpose of distributing it, the jury had to find (1) that Baker had culpable intent; and (2) that Baker's conduct constituted a substantial step towards the commission of the substantive, i.e., possession with the intent to distribute cocaine, that is strongly corroborative of that intent. *United States v. Pelton*, 835 F.2d 1067, 1074 (4th cir. 1987), *cert. denied*, 486 U.S. 1010 (1988). For Baker to have had culpable intent, he "must have been acting with the kind of culpability otherwise required for the commission of

the crime he is charged with attempting." *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir.), *cert. denied*, 469 U.S. 920 (984) (quoting *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976)). Therefore, in determining whether Baker had culpable intent--in other words, that he sought to possess cocaine with the intent to distribute it--we must decide (1) whether there is sufficient evidence in the record, taking all inferences in favor of the government, that Baker intended to use the money from the Bank to purchase cocaine, at all, rather than to flee, and (2) whether, assuming Baker intended to use the money to purchase cocaine, he intended to distribute the cocaine purchased rather than to use it himself. *See United States v. Mandujano*, 499 F.2d

370, 376, 379 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975).

Considering the first issue, we believe that sufficient evidence in the record exists, although just barely, that Baker intended to purchase cocaine with the money he was trying to obtain. Roy, the person from whom Baker was supposed to be buying cocaine and who testified on behalf of the government, offered contradictory testimony on this: He stated at one point that Baker intended to use the money to flee, at another point that Baker intended to use the money to buy some unspecified amount of cocaine, and at yet a third point that Baker intended to use the money to flee. Dwayne stated that Baker intended to use the money to pay for the cocaine from Roy that Baker had consumed the previous

night. Viewing the evidence in the light most favorable to the government, a reasonable jury could believe Roy's statement that Baker intended to use the money to buy some unspecified amount of cocaine and disbelieve his other statements regarding Baker's intentions to flee, and either in addition or alternatively, a jury could believe Dwayne's statement that Baker intended to use the money to pay for the previous night's cocaine. Either way, the requirement that Baker intended to use the money to buy cocaine would be met.

However, the government fails to meet its burden on the second issue to establish that Baker intended to use the money from the Bank to purchase cocaine for distribution. No testimony in the record suggests that Baker intended to

buy cocaine for the purpose of distribution on June 19, 1987, nor does any testimony in the record establish that Baker sought to purchase a particular or even approximate quantity of cocaine from which thee jury could infer that the purpose was distribution. Roy did not testify that Baker intended the cocaine for distribution instead of for personal consumption; he stated that he had no idea of the amount Baker intended to purchase or of the use he intended for the cocaine. Dwayne testified that Baker intended to use the money to pay for the cocaine Baker had consumed the previous night, a plan plainly inconsistent with distribution.

In addition, the fact that Baker asked Matthews to cash only a $100 counter check undercuts the inference

that Baker intended the money to purchase cocaine for distribution. Cocaine, the record demonstrates over and over again, is an expensive drug. The kilo of cocaine Roy had in his trunk was worth approximately $70,000; the cocaine the three men consumed the previous night was worth approximately $2,000.[4] The overwhelming costs involved with it purchase suggest that Baker likely sought such a small amount of money only to flee. Even accepting that he wanted the money to purchase cocaine, however, the extravagant costs involved make it difficult to draw any other conclusions

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[4] Shore testified and the government confirmed that she sold one ounce of cocaine to an undercover agent in 1987 for approximately $2,000. J.A. 544. We use this price as a rough approximation for the street value of cocaine. There are 35 ounces in a kilo, and 35 multiplied times $2,000 equals $70,000.

but that Baker intended to use the cocaine for personal consumption, either to pay for drugs previously used or to buy a small additional amount. Substantial uncontradicted evidence in the record points to the conclusion that Baker would have intended to consume any cocaine that he bought. The record makes it clear that Baker was undeniably a cocaine addict with a severe problem; he had just broken out of a hospital to which he had been committed by his wife for addiction; and he had consumed a large amount of cocaine just the previous night. the rest of the evidence the government presented about Baker's alleged limited past cocaine dealings is insufficient, drawing all inferences in the government's favor, to show that, on this particular occasion, Baker intended

to purchase cocaine for distribution. In fact, the only witness who testified to buying cocaine from Baker, Ruth Shore, was, by her own and Roy's accounts, purchasing cocaine from Roy and not Baker at the time that these events occurred.[5]

While the government has shown Baker's culpable intent *to possess* cocaine on June 19, 1987, this showing is insufficient for the government to carry it burden. Because the government has failed to show culpable intent by Baker to possess cocaine *with the intent to distribute it* on this particular day, the jury's guilty verdict for the attempt to

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[5] The fact that Baker ran away once he saw a police car does not demonstrate his intent to distribute cocaine. Baker was unquestionably fleeing the police since, as evidenced by their questions addressed to Roy in the parking lot, they were attempting to recommit Baker to the hospital.

distribute charge must be reversed and this charge dismissed.[6]

V.

Baker next appeals his conspiracy conviction by challenging the district court's refusal to give two jury instructions. First, Baker requested that the district court charge the jury on the lesser-included offense of conspiracy to possess cocaine. Second, Baker argued that, since a mere buyer/seller relationship is inadequate to establish his participation in the conspiracy to distribute, the court should charge the jury that Baker's distributor must have known that Baker intended to distribute cocaine, not

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[6] Because we find no culpable intent, we do not need to consider whether Baker's actions constituted a substantial step in carrying out this intent.

merely to use it personally.

A.

The court refused Baker's request to give the lesser-included conspiracy to possess cocaine charge because "simple possession is not charged." J.A. 914. That reasoning constitutes error. According to the Supreme Court, "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). Whether the individual was charged in the indictment with the lesser-included offense is irrelevant. *See* Fed.R.Crim.P.

31(c).[7] The Court's rationale for requiring the lesser-included instruction is that "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 212-13. For the defendant to be entitled to a lesser-included offense, the proof on the element that differentiates the two offenses must be sufficiently in dispute to allow a jury consistently to find the defendant innocent of the greater and guilty of the lesser offense. *See United States v.* Blankenship, 548 F.2d 1118, 1120 (4th Cir. 1976). We are in accord with the

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[7] According to Rule 31(c), Conviction of Less Offense, "The defendant may be found guilty of an offense necessarily included in the offense charged . . . ."

Seventh Circuit on the evidentiary requirements for demonstrating a dispute:

> Although requirement is satisfied by the presentation of sharply conflicting testimony on the element distinguishing the greater offense from the lesser offense, [citation omitted] it also may be satisfied where there is no conflict in the testimony but the conclusion as to the lesser offense fairly may be inferred from the evidence presented, "including a reconstruction of events gained by accepting the testimony of one or more witnesses only in part."

United States v. Medina, 755 F.2d 1269, 1273 (7th Cir. 1985) (quoting *United States v. Sinclair*, 444 F.2d 888, 890 (D.C. Cir. 1971)).

The district court has no discretion to refuse to give a lesser-included instruction if the evidence warrants the instruction and the defendant requests it. *See Guam v. Fejeran*, 687 F.2d 302,

305 (9th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1045 (1983); *see also United States v. Gibbs*, 904 F.2d 52, 58 (D.C. Cir. 1990) ("A defendant is entitled to an instruction on a lesser included offense of there is any evidence fairly tending to bear upon the lesser included offense, 'however weak' that evidence may be.'" (quotations omitted)). In addition, in prosecutions for conspiracy to possess is a necessarily included offense. *See United States v. O'Meara*, 895 F.2d 1216, 1219-20 (8th Cir.), *cert. denied*, 111 S. Ct. 352 (1990).

We have previously held that a lesser-included possession instruction in drug distribution cases such as this one is required if requested unless, as a matter of law, the evidence would "rule

out the possibility of a finding of simple possession, [because the quantity of drugs found was] so huge as to require that the case proceed on the theory that the quantity conclusively has demonstrated an intent to distribute." *United States v. Levy*, 703 F.2d 791, 793 n. 7 (4th Cir. 1983). In *Levy*, we held that the district court committed reversible error by refusing to charge the jury on the lesser-included offense of simple possession of 4.75 ounces of 95% pure cocaine in addition to the greater offense of possession with intent to distribute. *Id.* at 792-93. We reasoned that:

> [T]here was a substantial basis for an inference that the defendant might have possessed the cocaine only for his own consumption and not preliminary to sale or other distribution...[Because the] question of whether the

> defendant had the purpose to distribute was capable of two answers,...the lesser included offense instruction was appropriate.

Id. The District of Columbia Circuit in *United States v. Gibbs*, 904 F.2d 52 (D.C. Cir. 1990), also overturned a possession with intent to distribute cocaine conviction when the district court failed to charge the jury on the lesser-included offense of simple possession. That circuit's test mirrors ours:

> We have no doubt that the evidence was *sufficient* to convict the appellants of possession with intent to distribute; but, when the issue is the propriety of a lesser-included offense instruction, the test is whether a reasonable jury could nonetheless find the appellants guilty of only simple possession.

In this case, the evidence, as a matter of law, does not "rule out a possible inference of" conspiracy to

possess. *Levy*, 703 F.2d at 794 n. 7. It is clear that Baker was an addict. Roy testified that Baker's family kept trying to keep Baker from Roy, presumably to stop him from consuming cocaine, and Baker's wife eventually had to commit him to the hospital because of his addiction. Baker's defense at trial was that he was an abuser, not a distributor, of cocaine. *See* Tr. 64-67 (opening statement of Baker's counsel); Tr. 1517-1531 (closing statement). According to Roy, Baker bought one to three ounces of cocaine a week, which is a large amount but which could be consistent with personal consumption. According to Roy and the evidence adduced at trial, Baker was well off financially,[8] and nowhere did the

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[8] Baker had substantial family money, and he worked for his father, who owned Paddock Pools. Baker's father testified

government show that he paid for his drugs with proceeds from drug sales.

In addition, the evidence that Baker had participated in the conspiracy as a distributor was sufficiently in dispute to warrant the instruction. The jury rationally could believe the testimony of the government's witnesses about Baker's purchase of large amounts of cocaine, since his heavy addiction was undisputed, but choose not to believe the witnesses concerning Baker's alleged distributions of cocaine, isolated as they were. At

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to the large amounts of money Baker had access to: Baker was employed in various positions at Paddock Pools from 1983 until 1990; Baker received a work bonus in December 1986; Baker's father gave Baker a $20,000 loan in June 1987; and Baker had access to and made significant cash disbursements from his $162,000 trust fund. *See* Tr. 1361-66, 1389. According to Roy, Baker had a "fairly nice house, out on the river," J.A. 631, and owned a Blazer and a Bitter sports car.

trial, Baker argued vigorously that the jury should not credit testimony about the distributions, because, among other things, each witness who testified to this effect received favorable immunity agreements and thus could not be fully trusted. *See id.* (opening and closing statements). The jury indeed was not required to believe Shore's and Roy's testimony that Baker twice sold her an ounce of cocaine, since the government agreed in Shore's case not to deport her to Germany, and in Roy's case, it agreed to furnish him with a lawyer to contest his state guilty plea and not to prosecute him at all for the conspiracy to possess with the intent to distribute drugs. Similarly, the jury was not required to believe Roy's hearsay testimony about "Kit." We conclude that

the evidence would allow a jury to find that Baker was guilty merely of conspiracy to *possess* cocaine. Therefore, it follows that the district court erred in refusing to instruct, at Baker's request, the jury on this lesser-included offense.[9]

The jury necessarily found every fact required for convicting Baker of the lesser-included offense of conspiracy to possess cocaine when it found him guilty of the greater-included offense of

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[9] We do not dispute that sufficient evidence exists in the record to support the judge's instructing the jury on the issue that Baker conspired to possess with the intent to distribute cocaine. The record contains sufficient evidence to permit a jury rationally to find Baker guilty of such an offense. That is not the question facing us here, however. Rather, the question is whether, having given the instruction for the greater-included offense, the court was also required to give the instruction for the lesser-included offense.

conspiracy to possess with the intent to distribute cocaine. We find that there is sufficient evidence in the record to support Baker's conviction of the greater offense, and, as a result, there is also sufficient evidence to support his conviction of the lesser offense. Therefore, we hold that the district court may, after hearing from all parties and obtaining the government's consent, set aside Baker's conspiracy to distribute conviction and enter a judgment of conviction for the included offense of conspiracy to possess instead. Alternatively, it is within the district court's discretion to order a new trial. *See Levy*, 703 F.2d at 794 n.9 (raising possibility of utilizing procedure but finding it inappropriate in that case based on government's misconduct) (citing

United States v. Burns, 24 F.2d 95, 105 (10th Cir.), *cert. denied*, 449 U.S. 954 (1980)).

B.

Since the issues relating to Baker's and other challenges to the district court's jury instructions are not likely to recur, we decline to address them at this time.

VI.

For the aforementioned reasons, we reverse Blackwell's money laundering conviction but uphold his conspiracy to possess with the intent to distribute cocaine conviction. Since the district court imposed both of these sentences concurrently, our disposition does not disturb Blackwell's term of imprisonment. We also reverse both of Baker's convictions and remand this case to the

district court for further proceedings not consistent with this opinion.

No. 91-5313 - *REVERSED AND REMANDED FOR FURTHER PROCEEDINGS*

No. 91-5361 - *AFFIRMED IN PART AND REVERSED IN PART*

LUTTIG, Circuit Judge, concurring in the judgment in part and dissenting in part:

I concur only in the judgments reached by the court in Parts III and V of this opinion. In Parts II and IV of its opinion, respectively, the court reverses for insufficiency of the evidence appellant Blackwell's conviction for money laundering and appellant Baker's conviction for attempting to possess with intent to distribute cocaine. I dissent from these parts of the opinion because there was substantial evidence to support both these

convictions.

I.

The government introduced substantial evidence in support of Blackwell's money laundering conviction. The government's theory was that Blackwell enlisted Odas White, a friend and partner of Blackwell's in the drug trade, to purchase a boat from Darrell McKamey with Blackwell's drug transaction proceeds and to have McKamey retain title so as to disguise the true nature of the transaction.

It is undisputed that the government introduced evidence at trial that White did purchase a white boat with blue trim from McKamey with $30,000 in cash and did "front" McKamey one kilogram of cocaine, and that McKamey retained title to the boat. The majority holds, however, that

this and the balance of the evidence introduced by the government was inadequate to support Blackwell's conviction because, it concludes, there was insufficient evidence from which a juror could infer that Blackwell was responsible for White's purchase of the boat from McKamey.

The underlying error of the majority, and the error that causes it to adjudge the government's evidence on each of the above grounds insufficient, is that it refuses to permit the jury to make any inferences at all from the taped conversations between White and McKamey, because, it says, "neither McKamey nor White stated that the 'he' was who was keeping the boat." *Ante* at 9. Says the court, as a result of this "indefinite reference," the tapes are "too

inconclusive." This is a remarkable holding. White and McKamey repeatedly referred to "Tiny," which is Blackwell's nickname. They noted that "Tiny" was a Hell's Angel, which Blackwell was. They referred to the fact that "he" and his wife had "split up", which Blackwell and his wife had. J.A. at 287, 969. They alluded to the fact that "Tiny's girl friend" has been questioned by authorities, which Patricia Richards, Blackwell's girlfriend, had. *Id.* at 815-18. And they discussed the fact that a friend of "his" in the Hell's Angels had "rolled" and informed authorities of "his" boat purchase, which Blackwell's friend, Terry Norman, a former Hell's Angel, had recently done with respect to Blackwell. Not only is there no legitimate basis for denying jurors the

inference that White and McKamey were referring to Blackwell in these conversations; as a matter of common sense, it seems inconceivable that they were referring to anyone other than Blackwell.

When the evidence from the transcripts of the conversations between White and McKamey is properly considered, it is apparent that for each fact as to which the majority asserts that the evidence was insufficient, there is substantial, and in most instances overwhelming, record support.

The majority concludes, for example, that there was no evidence from which a juror could reasonably infer that the white with blue trim boat purchased by White was Blackwell's boat or possessed by him. *Ante* at 9. There was however, an

abundance of evidence to support either inference. White acquiesced in, if not confirmed, a statement by McKamey during their conversation of March 23, 1990, that Blackwell was keeping on the coast the boat that White bought from McKamey. J.A. at 287. And in the April 10, 1990, conversation between White and McKamey, White told McKamey that the Hell's Angel who "rolled" on Blackwell knew that Blackwell had a boat that he had bought in Charlotte, the location of White's purchase, and that law enforcement officials were interested in this boat. *Id.* at 355-57. Additionally, Terry Norman, the former Hell's Angel and friend of Blackwell's, informed law enforcement officials that Blackwell and his girlfriend Patricia Richards were towing a blue and white boat when they

visited him in Winston-Salem in 1989, *id.* at 436-47; likewise, Special Agent Warren testified that Richards had stated to him in an interview that she and Blackwell were towing a blue boat when they visited Norman in Winston-Salem. *Id.* at 816-18.

The majority concludes on a related score that "[t]he government never established that the man who accompanied White to the marina was Blackwell" and the "[e]ven if a reasonable jury could find that this man was Blackwell, the government failed to show that he was in any way involved in the transaction." *Ante* at 9. There was, however, a host of evidence from which the jury could have inferred both that Blackwell was the man accompanying White when he met with McKamey and that Blackwell was "involved in the transaction." The transcriptions

of the tapes of the conversations between White and McKamey establish a virtual certainty that Blackwell was involved in the transaction. They certainly are sufficient to permit the inference that he was behind the transaction. The government was not even required to prove that Blackwell accompanied White on the visit when he purchased the boat. But there was sufficient evidence from which the jury could make this inference. McKamey, for example, testified in court that Blackwell fit the description of the man who had accompanied White on the day when White purchased the boat. J.A. at 214-28. In concluding that there was insubstantial evidence that Blackwell was "involved in the transaction," *see ante* at 9, the majority seizes upon McKamey's testimony, J.A. at 217, that the man

accompanying White "walked away" before White actually proposed to McKamey that he purchase the boat. The mere fact that Blackwell "walked away" at the moment of the transaction in no way undermines the possibility of the inference that he was involved in the transaction. If anything, particularly given the nature of the crime, the fact that he walked away just before consummation of the sale tends to reinforce the permissibility of the inference that he was involved and merely wished to disguise his role in the transaction.

The majority next concludes that the evidence "never showed that [Blackwell] was the real owner" of the boat and that "[i]n fact, McKamey said that the boat was his." *Ante* at 10. Again, the transcribed tapes of the conversations

between White and McKamey all but conclusively establish that the boat purchased by White belonged to Blackwell. The fact that title remained in McKamey's name, of course, is entirely consistent with, in fact an integral part of, the money laundering offense of which Blackwell was convicted.

Finally, the majority determines that the government never proved that the $30,000 used by White to purchase the boat was Blackwell's or that it represented drug proceeds. *Id.* The jury obviously could reasonably infer that the purchase money was Blackwell's from the substantial evidence that he was present when the boat was purchased; that he was repeatedly seen in the possession of the boat after the purchase; and that he attempted to disguise his ownership of

the boat by having White purchase it and by arranging that McKamey retain title. Likewise, the jury could permissibly infer that the funds used to purchase the boat represented drug proceeds from the considerable evidence that Blackwell was a drug dealer and that, for no apparent reason, he attempted to hide his ownership of the boat from authorities.

Because the government introduced substantial evidence that Blackwell had laundered money in violation of 18 U.S.C. § 1956, I would affirm Blackwell's conviction. Indeed, in my view, the court's reversal of this conviction represents a disturbing example of an unabashed substitution of an appellate court's view of the evidence for that of the jury.

II.

The evidence proffered by the government as to Baker's attempt to possess with the intent to distribute cocaine also was more than sufficient to support the jury's verdict.

There was testimony at the trial that Baker had distributed cocaine in the past. *See, e.g.*, J.A. at 534-36. Although not without discrepancy, both Roy and Dwayne Langley testified that Baker had intended to withdraw money from the bank on June 19, 1987, for the purpose of purchasing cocaine from Roy. *See id.* at 642-43, 736-37. Roy also testified that Baker had sufficient assets that he could have afforded to buy "an amount" of cocaine that day. *Id.*, at 63. Because Baker was at the bank when Roy was arrested while in the possession of one kilogram of cocaine, *id.* at 644-

46, and because there was testimony that Baker had the financial wherewithal to purchase this amount of cocaine, a jury could reasonably infer that Baker intended to purchase that amount. Of course, a jury can permissibly infer an intention to distribute from the attempted possession of a kilogram of cocaine.

That Baker attempted to cash a counter check at one bank for only $100 does not, contrary to the majority's view, *see ante* at 15, defeat the permissibility of this inference, because the government also introduced evidence that Baker subsequently went to a second bank to withdraw money to purchase cocaine from Roy Langley. J.A. at 644, 737-38. There was no testimony that Baker was "well off financially," *see*

ante at 19 & n.8, and that Baker could afford to purchase "any amount" of cocaine.

A jury surely could reasonably conclude based upon this evidence that Baker had the intent and the means to purchase up to a kilogram of cocaine with the purpose of distributing it, and that his efforts to obtain the funds necessary to purchase the cocaine from Roy Langley constituted a substantial step toward achievement of that objective. Because the government produced sufficient evidence to support Baker's attempt conviction, I would also affirm the jury's guilty verdict on this charge.